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JOSEPH F. SPANIOL, JR.
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No. 89-463

In the Supreme Court of the United States

October Term, 1989

THOMAS W. TIERNEY

Petitioner,

vs.

STATE OF NEW MEXICO

Respondent.

SECOND SUPPLEMENTAL BRIEF PURSUANT TO SUPREME COURT RULE 22.6

WILLARD B. BUNCH, ESQ.
(Counsel of Record)
Suite 250, Palace Building
1150 Grand Avenue
Kansas City, MO 64106
(816) 421-4334

ATTORNEY FOR PETITIONER

SECOND SUPPLEMENTAL BRIEF

Petitioner files this Second Supplemental Brief pursuant to Supreme Court Rule 22.6 to advise the Court that prosecution witness Thomas C. Jackson, in oral civil depositions commenced during the month of October, 1989, has admitted that he did not fly petitioner to Clovis, New Mexico on three (or any) separate occasions during the last half of December, 1982 as he testified at trial; nor was he present at the plant construction sites with petitioner at any time during that period.

Thus, the particularly damaging testimony which he gave at trial concerning petitioner's knowledge of the status of completion of the plants and of the conditions existent at the construction site, as evidenced by the excerpt from his trial testimony set forth in the Appendix hereto, was totally false.

Said witness has likewise belatedly

produced heretofore undisclosed personal diaries evidencing his daily activities during said period, which his testimony indicates were made known to the prosecution, but were not taken into possession for their "open" discovery file, nor produced pursuant to petitioner's Brady requests or in response to the court's order in aid of discovery of March 12, 1987.

Each of the foregoing facts support petitioner's position that he is entitled to both trial and appellate consideration, if necessary, of his motion for new trial before forfeiture of his freedom on bail. Said facts have been reported to the prosecution, which has taken no action with respect thereto.

Respectfully submitted,

WILLARD B. BUNCH, ESQ.
Suite 250, Palace Building
1150 Grand Avenue
Kansas City, MO 64106
(816) 421-4334

ATTORNEY FOR PETITIONER

APPENDIX

Excerpt from Direct Examination of
Thomas C. Jackson during Trial

Q. I'd like to call your attention to the last entry that's made on what appears to be No. 15 or Line 15 of State's Exhibit 22 in evidence. Are you able to read that particular entry?

A. Yes, sir. Line 15 has two entries on it.

Note: State's Exhibit 22, referred to herein was the one page flight maintenance log purportedly evidencing all flights made by Mr. Jackson's Cessna 310 aircraft during the months of November and December, 1982. With respect thereto, Mr. Jackson made the following unequivocal statement on cross examination at trial: "I am not sure about the trip that took the 310 to be painted. I have indicated here a name of Burnley, who was Randall W. Burnley, who was also an approved pilot on my insurance policy for this airplane, and it went to Tulsa and Oklahoma City. I think that would be the only exception, sir, and I am not quite sure that I wasn't there also. My indication says it was with Burnley, and yet the pilot category lists Burnley as the pilot. Without exception I would say, sir, that I was on board each of these other trips on this page."

Q. We're talking about the bottom entry.

A. The bottom entry says that between the 16th day and the 31st day of December, 1982, we made three round trips in the 310 from Joplin to Kansas City Downtown Airport, to Clovis, to Phoenix, to Kansas CityDowntown Airport, and back to Joplin, for a total of 19 hours flight time.

Q. Is there any indication on your flight log as to who was present on those three trips between the 16th and 31st of December, 1982?

A. Yes, sir. Mr. Walker and Mr. Tierney.

Q. Could you tell the jury, what were you and Mr. Walker and Mr. Tierney doing in Clovis? Why were you in Clovis, if you know, in the last two weeks of December, 1982?

A. These were routine trips for which I provided air transportation for anybody that was going from the Midwestern Companies for purposes of reviewing the status of construction in Clovis.

Q. Mr. Jackson, is it fair to say that in the fall or early winter of 1982, the Midwestern Companies was constructing ethanol plants in Clovis?

A. Yes, sir.

Q. Is it fair to say, sir, that you observed the construction process from the top, through your trips to Clovis, from the time the plants began through the middle of December?

A. Yes, sir.

Q. What can you tell the jury about the condition of the plants that you saw in the middle to the end of

December, in Clovis, in 1982?

A. The several facilities had been begun. None of them had been completed, and because they had been begun in sequence, like No. 1, and 2, and 3, and 4, and so forth, they were in varying degrees of completion, construction completion.

Q. In these three trips that you took to Clovis between December 16th and 31st, did you ever have occasion to go to a construction site with the Defendant, Tom Tierney?

A. Yes, sir.

Q. Could you tell the jury what the conditions were like, the weather conditions and the construction conditions, at the construction site in late December, 1982?

A. Well, the flying weather was horrendously bad at that particular time, and Clovis had -- was ex

periencing, so it was reported, one of its worst winters in a long time.

Q. Was it just cold?

A. No, sir. It was wet. The ground was unstable. The roads were wet. The site itself was extremely muddy. When I stepped out of the car, I went up to my knees in mud.

Q. Well, was that a problem for the construction crews?

A. Yes, sir, the vehicles could hardly move, and these were large-tired vehicles.

Q. Are you talking about bulldozer type vehicles?

A. Well, I think you call them front-end loaders, but they had big tires.

Q. Based upon your observation of these plants in the middle to late December, at the time that you were

looking at them, did you reach any conclusion from your observation as to whether or not those plants could be completed by the end of December, 1982?

A. Yes, sir. They could not be completed.

Q. You're not a person who is experienced in construction?

A. That's true.

Q. But you're giving us an opinion as a lay person?

A. Yes, sir. Parts were lying all over the property.

Q. Now, in your opinion, how much time did you spend at the construction site in the last two weeks of December, 1982 with the Defendant, Tom Tierney, if you recall?

A. We would be on the ground for whatever was the business at hand. We were probably there a couple of

hours at a time.

Q. You had seen the progress from the beginning of the construction of the plants up until about December 15. Was there anything about the progress that you saw from the beginning of construction to December 15th that led you to conclude that it would be possible for the plants to move from where they were approximately December 15th to completion at the end of December, 1982?

A. Not from my point of view, no.

Q. Was the completion of these four Clovis ethanol plants by December 31, 1982, was that important to the Midwestern Companies at that time?

A. I believe so.

Q. I think we've all seen these movies where the people were covered in mud or oil when an oil well comes in, and they all seem to be smiling

while they're watching till the oil well gets capped. Is that what the situation was in Clovis in the last two weeks while people were standing in the mud watching these plants being completed? Was there elation on everybody's face from the Midwestern Companies, while these plants that were going to be so profitable for them were being constructed or finished? What was the mood?

A. That everything was behind schedule. That the weather conditions and the flow of material was slow or not there. Concern.